(1) Supreme Court, U.S.
FILED
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No. 00-

IN THE

Supreme Court of the United States

MICHAEL TEN EYCK, individually, THOMAS LINDERT, individually, CARMINE RESTIVO, JR., individually, and ROBERT THOUBBORON, individually,

Petitioners,

v.

JOHN LEATHER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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9APP

QUESTION PRESENTED

Whether this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), remains good law.

PARTIES TO THE PROCEEDING

The petitioners are Sheriff Robert Thoubboron; Captain Carmine Restivo, Jr.; Sergeant Thomas Lindert; and Deputy Sheriff Michael Ten Eyck, all members of the Putnam County, New York Sheriff's Department. Petitioners were defendants-appellants in the United States Court of Appeals for the Second Circuit. The respondent is John Leather, the plaintiff-appellee in the Second Circuit. The County of Putnam, a defendant-appellant in the Second Circuit, is also being served as a respondent.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	5
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Agostini v. Felton, 521 U.S. 203 (1997) 7

Cabrera v. City of Huntington Park, 159 F.3d 374 (9th Cir. 1998) 8

DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000) ... 8

Figueroa v. Rivera, 147 F.3d 77 (1st Cir. 1998) ... 8

Heck v. Humphrey, 512 U.S. 477 (1994) ..... *passim*

Huey v. Stine, 230 F.3d 226 (6th Cir. 2000) 8

Jenkins v. Haubert, 179 F.3d 19 (2d Cir. 1999) ... 3

People v. Blount, 90 N.Y.2d 998 (1997) 8

People v. Corso, 40 N.Y.2d 578 (1976) 9

People v. Goodman, 31 N.Y.2d 262 (1972) 9

Randell v. Johnson, 227 F.3d 300 (5th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3480 (April 16, 2001) 8

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 7

Cited Authorities

	Page
Schilling v. White, 58 F.3d 1081 (6th Cir. 1995) ...	6
Spencer v. Kemna, 523 U.S. 1 (1998) 3, 6, 7, 8	
State Oil Co. v. Khan, 522 U.S. 3 (1997)	7
United States Constitution:	
First Amendment	2, 4
Statutes:	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2254	2
42 U.S.C. § 1983	*passim*
Other Authorities:	
New York Criminal Procedure Law § 440.10	9
New York Vehicle Traffic Law § 1192	3
S. Speiser, C. Krause and A. Gans, American Law of Torts § 28.5 (1991)	9
The Journal News, 10/11/2000	10

TABLE OF APPENDICES

Page

Appendix A — Summary Order Of The United States Court Of Appeals For The Second Circuit Dated And Filed January 24, 2001 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Southern District Of New York Dated May 11, 2000 ..... 14a

Appendix C — Opinion Of The United States Court Of Appeals For The Second Circuit Dated And Decided June 11, 1999 ..... 34a

Appendix D — Memorandum And Order Of The United States District Court For The Southern District Of New York Dated February 2, 1998 ..... 47a

Appendix E — Memorandum And Order Of The United States District Court For The Southern District Of New York In *Yajure, et al v. Dimarzo, et al.*, No. 00 Civ. 7423 (CM) Dated And Filed February 14, 2001 ..... 60a

OPINIONS BELOW

The District Court's opinion granting petitioners' motion to dismiss (App. D) is unpublished. The Court of Appeals' decision (per Calabresi, joined by Straub and Tsoucalas, sitting by designation) vacating the dismissal order and remanding the case for further proceedings (App. C) is published at 180 F.3d 420. The District Court's opinion denying petitioners a new trial but reducing the punitive damages awards (App. B) is also unpublished. The Court of Appeals' Summary Order (Calabresi, Van Graafeiland, and Patterson, sitting by designation) affirming the District Court's post-trial decision (App. A) is unpublished.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on January 24, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983 ("Section 1983"), provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

The federal habeas corpus statute, 28 U.S.C. § 2254, provides in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

1. In 1997, John Leather filed this Section 1983 damage action against Robert Thoubboron, the Sheriff of Putnam County, New York; five members of the Putnam County Sheriff's Department; and Putnam County itself, claiming that the defendants had targeted him for arrest in retaliation for his exercise of his First Amendment rights. The complaint alleged that in 1992 and 1993, a debate raged in Putnam County as to whether the Sheriff's Department should control the County's Emergency "911" communication center; that Leather, the County's fire coordinator, had been a vocal advocate for vesting control of the 911 system in civilian hands; and that Sheriff Thoubboron had targeted Leather for arrest because of that advocacy.

Specifically, Leather alleged that on the evening of December 2, 1994, members of the Sheriff's Department had kept him under surveillance while he dined with his wife at a local restaurant, where they consumed several alcoholic beverages. After he and his wife left the restaurant, two officers stopped his vehicle on the road and arrested him for driving while intoxicated, all allegedly as part of a

prearranged plan. Leather was subsequently convicted after a non-jury trial for driving while impaired, New York Vehicle Traffic Law ("VTL") § 1192(1), a traffic infraction punishable by a fine or imprisonment up to 15 days.[1] He was assessed a $300 fine and a $25 surcharge, and his driver's license was suspended for 90 days. He did not appeal his conviction.

2. The District Court dismissed Leather's § 1983 action on the ground that its success "would 'necessarily imply' the invalidity of [Leather's] criminal conviction," and therefore the action was barred under this Court's decision in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994) ("to recover damages for allegedly unconstitutional conviction . . . a § 1983 plaintiff must prove that the conviction . . . has been . . . declared invalid").

3. The Second Circuit reversed the dismissal order. Relying upon Justice Ginsburg's concurring opinion in *Spencer v. Kemna*, 523 U.S. 1, 21 (1998), it held that *Heck* did not apply because "Leather [unlike Heck] is not and never was in the custody of the State [and therefore] has no remedy in habeas corpus" to challenge his conviction. App. 40a. *See also Jenkins v. Haubert*, 179 F.3d 19 (2d Cir. 1999) (discussing effect of Justice Ginsburg's *Spencer* concurrence on *Heck*'s favorable termination rule). The court also ruled that neither *res judicata* nor collateral estoppel barred Leather's § 1983 action. The former doctrine was inapplicable because Leather could not have sought damages

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1. A blood test revealed that Leather's blood alcohol level was .09 percent. Under New York law, driving with a blood alcohol level of .10 percent or higher is a per se violation of the driving while intoxicated statute, VTL § 1192(2), a misdemeanor. A level between .07 and .10 percent is "prima facie evidence" of impairment. Leather was also convicted of driving left of the double line.

as a defendant in his criminal trial. The latter doctrine did not apply because "[o]n this record, [the court could not] say that the question of selective prosecution [had been] 'clearly raised' . . . or 'actually decided' in the State court hearing." App. 45a.[2]

4. On remand from the Court of Appeals, a jury found petitioners and the County liable for violating Leather's civil rights. It awarded compensatory damages in the amount of $200,000, punitive damages against Sheriff Thoubboron in the amount of $435,000, and punitive damages in lesser amounts (ranging from $2,000 to $5,000) against the other individual defendants.

5. The defendants then moved for post-trial relief. The District Court denied the motion for a new trial and found that the compensatory damages award was "reasonable in the context of the entire case." App. 26a. The punitive damages award against Sheriff Thoubboron, however, was found to be "so large as to shock the conscience of the Court," App. 28a, and the punitive awards against the other individual defendants were set aside as unjustified. The District Court therefore granted a conditional new trial limited to damages unless plaintiff executed a written remittitur reducing the punitive damage award against Sheriff Thoubboron to $3,000.[3] Plaintiff executed the remittitur.

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2. The Second Circuit found that Leather's attorney had mentioned selective prosecution at the criminal trial but "in passing . . . and only in his closing argument." App. 45a.

3. The District Court found there was "no evidence" that Sheriff Thoubboron had sought "to procure anything but a *bona fide* arrest." A jury, however, could have concluded that "the professional courtesy which is not uncommonly extended to public officials" in vehicle and traffic matters was withdrawn as to Leather because of his exercise of his First Amendment rights. App. 27a, 28a.

6. The defendants appealed to the Court of Appeals. Once again, they argued that Leather's § 1983 action was barred by this Court's decision in *Heck* because Leather's conviction had not been invalidated. The Court of Appeals rejected the argument, noting only that the "reprise adds nothing that would make it proper . . . to reconsider [the issue]." App. 8a.[4]

7. This petition for a writ of certiorari followed.[5]

REASONS FOR GRANTING THE WRIT

The petition should be granted because: (i) the Second Circuit declined to follow this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), which is directly on point; and (ii) there is a conflict in the Circuits as to *Heck*'s vitality.

In *Heck*, the petitioner, who had been convicted of manslaughter and was serving a 15-year sentence, filed a § 1983 damage action, claiming, *inter alia*, that the prosecution and police had engaged in an unlawful investigation and had knowingly destroyed exculpatory evidence to secure his conviction. The District Court dismissed the action because it directly implicated the legality of Heck's confinement, and the Seventh Circuit affirmed on the ground that the § 1983 suit was, in effect, an application for habeas corpus and therefore Heck was

4. The court's opinion refers to the "County's" argument, but petitioners expressly joined in the *Heck* argument. *See* Brief of Defendants-Appellants Ten Eyck, Lindert, Restivo and Thoubboron at p. 1, n.1.

5. The County has paid the judgment and is not seeking certiorari.

required to exhaust his state remedies. This Court then granted certiorari. The Court upheld the Seventh Circuit's judgment but not on exhaustion grounds. Rather, it relied upon "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments" and held that the principle "applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction." 512 U.S. at 486. Thus, the Court concluded that to recover damages for an allegedly unconstitutional conviction, "a § 1983 plaintiff must prove that the conviction . . . has been reversed . . . expunged . . . declared invalid . . . or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 487.

Four justices joined in a separate concurring opinion, authored by Justice Souter, which would have limited the favorable termination requirement to cases in which the § 1983 plaintiff was in custody and therefore had access to federal court by way of habeas corpus. On this view, an individual not in custody for whom a federal habeas remedy was unavailable — *e.g.*, someone who was merely fined or who had completed a term of imprisonment — could bring a § 1983 damage action even if his conviction had not been invalidated.

Plainly, if *Heck* is still good law, the Second Circuit was wrong in allowing Leather's § 1983 action to proceed to trial. Because a judgment in Leather's favor "would necessarily imply the invalidity of his conviction," *Heck* bars the suit. *See Schilling v. White*, 58 F.3d 1081, 1086 (6th Cir. 1995) ("*Heck* applies as much to prisoners in custody (a habeas prerequisite) as to persons [not] incarcerated"). To escape this conclusion, the Second Circuit looked to *Spencer v.*

Kemna, 523 U.S. 1 (1998), in which this Court considered whether a habeas petition that sought to invalidate an order revoking the petitioner's parole was moot because the petitioner had completed his term of imprisonment. Among the unsuccessful arguments petitioner advanced to forestall a mootness finding was one implicating the *Heck* favorable termination rule — that because *Heck* barred him from pursuing a § 1983 damage action until he had established the invalidity of his parole revocation, his habeas action had practical consequences. In discussing this argument in her concurring opinion, Justice Ginsburg, who had joined the majority opinion in *Heck*, announced that she had "come to agree with Justice Souter's reasoning [in his *Heck* concurrence]: Individuals without recourse to the habeas statute because they are not, 'in custody' . . . fit within § 1983's, 'broad reach' " *Id.* at 21 (Ginsburg, J., concurring). Tallying the votes, the Second Circuit held that, after *Spencer*, five justices followed Justice Souter's approach and thus Leather (who did not have a federal habeas remedy) could bring a § 1983 action without first satisfying *Heck*'s favorable termination requirement.

The problem with the Second Circuit's approach, of course, is that if *Heck* is no longer good law, this Court, and not the Second Circuit, should say so. This Court has admonished the lower federal courts to follow its precedents, even if weakened by subsequent pronouncements, and to leave to the Court "the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 207 (1997); *see also State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 486 (1989) (Stevens, J., dissenting) (refusal to following a controlling precedent is "an indefensible brand of judicial activism"). By relying on dictum in a concurring opinion in *Spencer* to limit *Heck*'s favorable termination requirement, the Second Circuit has ignored this admonition.

Because of the Second Circuit's decision, the Courts of Appeals are now divided on *Heck*'s reach. The First, Fifth, Sixth, and Ninth Circuits have observed that Justice Ginsburg's concurrence in *Spencer* casts doubt on *Heck*, but have concluded that *Heck* remains good law. *Figueroa v. Rivera*, 147 F.3d 77, 80 (1st Cir. 1998) ("[w]e obey [the Supreme Court's] admonition" and follow *Heck*); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000) ("we decline to announce for the Supreme Court that it has overruled one of its decisions"), *cert. denied*, 69 U.S.L.W. 3480 (April 16, 2001); *Huey v. Stine*, 230 F.3d 226, 229 (6th Cir. 2000) ("we will continue to follow the Supreme Court's directly applicable precedent"); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 n.6 (9th Cir. 1998) ("*Heck* remains good law"); *see also DeWalt v. Carter*, 224 F.3d 607, 617 n.5 (7th Cir. 2000) (noting that the Supreme Court has "expressly disapproved the practice of relying on statements in separate opinions to determine whether a case has been overruled"). Had Leather's claim been brought in any of these Circuits, it would not have survived a motion to dismiss.

Not only is the Second Circuit's holding inconsistent with *Heck* and with recent decisions (all post-*Spencer*) in other Circuits, it is wrongly decided even if the court were writing on a clean slate. *Heck* imposed a favorable termination requirement, in part, so that a criminal defendant would not be encouraged to mount a collateral attack on his conviction by way of a civil suit. 512 U.S. at 484-85. That is precisely what was permitted to occur here. Leather did not raise a selective prosecution defense in his criminal case, even though the evidence to support such a claim was available to him and even though a successful assertion of that defense would have prevented his conviction under New York law. *See People v. Blount*, 90 N.Y.2d 998 (1997);

People v. Goodman, 31 N.Y.2d 262 (1972). He then chose not to appeal his conviction or attack it collaterally in the New York state courts, even though state review was, and *is*, available to him. New York Criminal Procedure Law § 440.10; *People v. Corso*, 40 N.Y.2d 578 (1976). Instead, he filed this § 1983 action, arguing that his conviction entitles him to a substantial damage award.

It is difficult to imagine that Congress intended such a result. The *Heck* rule embraces federalism concerns that the Second Circuit ignored. It gives the state courts the first opportunity to correct federal constitutional errors and thereby minimizes the potential for friction between the federal and state systems. By contrast, the Second Circuit's approach encourages persons situated like Leather to bypass the state appellate process and rush into federal court. The result is what *Heck* sought to avoid: a person "succeeding in [a] tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." 512 U.S. at 484, quoting S. Speiser, C. Krause and A. Gans, American Law of Torts § 28.5 at 24 (1991). Surely something is wrong when the compensatory damages awarded in a case are for "harm" flowing from a conviction that remains valid. *Heck*, 512 U.S. at 486 n.7 ("we hold today [that compensable injury] does *not* encompass the 'injury' of being convicted . . . (until [the] conviction has been overturned)."

A recent case in the Southern District of New York underscores the point. There, the § 1983 plaintiffs were convicted in Peekskill, New York, for trespassing when they entered a work site to protest the City's demolition of a building that arguably had historic significance. Rather than

raise selective prosecution as a defense in the criminal case or seek appellate relief in state court, they filed a § 1983 action seeking damages for an unconstitutional prosecution. Indeed, their lawyer boasted publicly that the conviction was "great because it increases the damages against the . . . Police Chief." *See* The Journal News, 10/11/2000 at 38. Such an outcome is not "great" for anyone who respects federalism and believes that state courts should be afforded a first opportunity to review state convictions.[6] To ensure the proper result, this Court should grant the petition and reaffirm that *Heck* applies to this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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6. The case discussed in the text is *Yajure* v. *DiMarzo, et al.*; the District Court's unpublished opinion, which refers to the *Heck* issue at n.2, is reproduced at Appendix E.

APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED JANUARY 24, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 24th day of January, two thousand and one.

PRESENT:

HON. ELLSWORTH VAN GRAAFEILAND,
HON GUIDO CALABRESI,
Circuit Judges, and
HON. ROBERT P. PATTERSON,*
District Judge.

No. 00-7703(L)
00-7747(CON)

JOHN LEATHER,

Plaintiff-Appellee,

v.

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* The Honorable Robert P. Patterson, Jr., of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

MICHAEL TEN EYCK, individually, THOMAS LINDERT, individually, CARMINE RESTIVO, JR., individually, ROBERT THOUBBORON, individually and THE COUNTY OF PUTNAM, NEW YORK,

Defendants-Appellants.

SUMMARY ORDER

Appeal from the United States District Court for the Southern District of New York (Charles L. Brieant, *District Judge*).

UPON DUE CONSIDERATION, it is ORDERED, ADJUDGED, AND DECREED that the judgement of the district court be and hereby it is AFFIRMED.

* * *

I. BACKGROUND

Defendants Michael Ten Eyck, Thomas Lindert, Carmine Restivo, Jr. & Robert Thoubboron (the "individual defendants"), and the County of Putnam (the "County") appeal from a jury verdict finding that defendants subjected John Leather (the "plaintiff") to selective prosecution in retaliation for the exercise of his right to free speech guaranteed under the First and Fourteenth Amendments, all in violation of 42 U.S.C. § 1983. A summary of the facts underlying the case may be taken from an earlier opinion of our Court:

Appendix A

Leather's § 1983 claim is based on a course of events that occurred in Putnam County, New York. At that time, Leather was the duly appointed fire coordinator for the County, and the individual defendants were all members of the County Sheriff's Department.[1] In his complaint, Leather alleged that in 1992 and 1993 a fierce debate was taking place in the County over whether the Emergency "911" communications center ("E-911") would be controlled by civilians or by the County Sheriff's Office. Leather maintains that he was a vocal public advocate on behalf of vesting control of the E-911 services in civilian hands, which, he argued, would lead to better emergency services in the community. In contrast, the members of the Sheriff's Office were actively trying to gain control of the E-911 communications center.[2]

Leather contends that, in retaliation for his public statements, the Sheriff's Office both threatened him (and others who made similar statements) and targeted him for prosecution. Specifically, Leather alleges that on the evening of December 2, 1994, three members of the Sheriff's Department kept him under surveillance

1. Defendant Thoubboron was Sheriff of Putnam County, defendant Ten Eyck was a Deputy Sheriff, Defendant Lindert was a Sergeant, defendant Restivo was a Captain, and defendant Stevens was a Senior Investigator.

2. The Sheriff's Office apparently succeeded in its efforts.

> while he dined at a local restaurant with his wife and consumed one or more alcoholic beverages. Shortly after he and his wife left the restaurant, Leather was stopped on the road by two of the officers (Ten Eyck and Lindert) and arrested on charges of driving while intoxicated. Thereafter, he was successfully prosecuted on a lesser charge of driving while impaired (because his blood alcohol level, which tested at .09 percent, was insufficient to support a per se finding of driving while intoxicated). He was assessed a $300 fine as well as a $25 surcharge, and his driver's license was suspended for 90 days. Leather did not appeal this conviction, rendered in the Justice Court for the Town of Southeast.

Leather v. Ten Eyck, 180 F.3d 420, 422 (2d Cir. 1999).

The plaintiff subsequently filed the § 1983 suit now before us and, after a moderately involved procedural history, the case went to trial before a jury. The jury found for the plaintiff, and awarded the plaintiff $200,000 in compensatory damages against all defendants and punitive damages of $435,000 against Robert Thoubboron, $5,000 against Carmen Restivo, $3,000 against Thomas Lindert, and $2,000 against Michael Ten Eyck.[3]

Following the jury's verdict, the defendants moved for judgment as a matter of law on all claims, for a new trial on

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3. The jury also awarded the plaintiff's attorneys legal fees and disbursements.

the issues of liability and damages, and, in the alternative, for a remittitur of the damage awards. The district court denied all defendants' motions save the motion attacking punitive damages. As regards this motion, the district court set aside the punitive damages awards against defendants Ten Eyck, Lindert, and Restivo, finding that the record did not support punitive damages against them. *Leather v. Ten Eyck*, 97 F. Supp. 2d 482, 488 (S.D.N.Y. 2000) (citing *McCardle v. Haddad*, 131 F.3d 43, 53 (2d Cir. 1997) (holding that punitive damages are appropriate in a § 1983 action only when "[a] defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others") (internal quotation marks omitted)).

Furthermore, the district court found that although punitive damages against defendant Thoubboron were permissible, the $435,000 awarded was so large as to shock the conscience of the court and exceed the power of the trial jury under the United States Constitution. *Id.* at 489-90 (citing *BMW of North America v. Gore*, 517 U.S. 559 (1996); *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992)). Accordingly, the district court ordered that unless the plaintiff executed a written remittitur reducing the punitive damages award against defendant Thoubboron to $3,000, a new trial limited to the issue of compensatory and punitive damages, would be granted. *Id.* at 490-91. Plaintiff executed the remittitur.

Defendants now appeal the modified verdict, raising various issues. The individual defendants argue (1) that the district court made numerous evidentiary errors, and (2) that

the representation of the individual defendants and the County by the same counsel was inappropriate. The County, in addition to joining in the defendants' claims of evidentiary error, also argues (3) that because plaintiff's state conviction for driving while impaired remains in full force and effect, his § 1983 claim is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), (4) that because plaintiff raised the issue of selective prosecution in the state criminal proceeding, his § 1983 claim is barred by the doctrine of collateral estoppel, (5) that the compensatory damages award was excessive, and (6) that the County is not subject to liability for the acts of its employees, *see Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978), and, in particular, that defendant Sheriff Thoubboron is not a County policy-maker for whose actions the County would be liable, *see Pembaur v. Cincinnati*, 475 U.S. 469 (1986). Finally, the individual defendants add, in their reply brief, (7) that this Court's recent decision in *Diesel v. Town of Lewisboro*, 232 F.3d 92 (2d Cir. 2000), entails that plaintiff's § 1983 selective enforcement claim fails as a matter of law.[4]

II. DISCUSSION

Defendants' first six claims are meritless and may be straightforwardly rejected:

(1) Even if the district court did make the evidentiary errors defendants allege (involving violations of the

4. We note that *Diesel* was decided on November 9, 2000, after the October 2 submission of the individual defendant's initial brief but before the December 1 submission of their reply brief. It is, therefore, properly raised in the latter brief.

hearsay rule and of Fed. R. Evid. 404(b)'s rule against character propensity inferences), defendants failed either to object to the admission of this evidence at trial or to request curative jury instructions. Accordingly, we review the district court's evidentiary rulings for plain error only. *See Caruolo v. John Crane, Inc.*, 226 F.3d 46, 55 (2d Cir. 2000). This standard supports reversal only where a district court's evidentiary ruling, which is always accorded substantial deference, was not only erroneous, but also "result[ed] in a miscarriage of justice or is an obvious instance of misapplied law." *Id.* (internal quotations marks omitted) (alteration in original). Neither of these extreme circumstances applies to the case at bar.

(2) Even though it may have been less than ideal for the individual defendants and the county to be represented by the same lawyer, *Dunton v. County of Suffolk*, 729 F.2d 903 (2d Cir. 1984), does not support defendants' claim that this joint representation generated a conflict of interest mandating a new trial. In *Dunton*, the county's defense was that the individual defendant had "act[ed] as an irate husband" and "not even as an officer," so that the tort the plaintiff complained of had, in the most literal sense, nothing to do with the county. *Id.* at 906. In the case at bar, by contrast, it is unquestioned that the individual defendants acted in their official capacities. Furthermore, a necessary element of the conflict of interest claim the individual defendants present is that "counsel actively

represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." *Gordon v. Norman*, 788 F.2d 1194, 1198 (2d Cir. 1986). Defendants have presented no evidence of an adverse effect on trial counsel's performance here. Indeed, trial counsel appears vigorously to have pursued defenses available only to the individual defendants, presenting a qualified immunity defense on behalf of the individual defendants and several times moving to dismiss the individual defendants from the case.

(3&4) The county's arguments concerning *Heck* and collateral estoppel have already been rejected in our earlier decision in this case. *See Leather*, 180 F.3d at 423-26. The County's reprise adds nothing that would make it proper for us to reconsider them. They must therefore be dismissed.

(5) As defendants themselves in effect admit, their claim of excessive damages turns on the notion that because plaintiff actually drove while impaired by alcohol, he could have been caught and convicted even without defendants' alleged selective enforcement, so that any lost income plaintiff suffered cannot have been proximately caused by defendant's alleged misconduct. But while it is true that "if taken for both proper and improper reasons, state action may be upheld if the action would have been taken based on the proper reasons alone," *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996), this rule cannot be applied to the case at bar. Even if plaintiff, once

caught, would have been convicted without defendants' misconduct, the jury's verdict shows (see the discussion of *Diesel infra*) that plaintiff would not have been investigated and caught but for their misconduct. Accordingly, defendants' misconduct did cause plaintiff's lost income, and the damages awarded were not excessive.

(6) Although defendants correctly assert that a county is not generally liable for work-related torts committed by its employees, *see Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978), *Monell* also makes clear that "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declarative, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.*, at 690. And, as defendants acknowledge, the action of a single official with final policy-making authority can generate municipal liability in this way. *Pembaur v. Cincinnati*, 475 U.S. 469 (1986). In the circumstances of this case, defendant Sheriff Thoubboron was sufficiently a policy-maker for the County for it to be liable for his practices. *Cf. Jeffes v. Barnes*, 208 F.3d 49 (2d Cir. 2000) (deeming a New York State Sheriff to be a county's policy making official in a whistle-blowing context).

Finally, defendants' seventh contention must also be rejected, although a slightly longer discussion is needed to explain why.

Appendix A

In *Diesel*, the plaintiff, a New York State Trooper who had assisted in an internal affairs investigation of misconduct by some of his colleagues, brought a § 1983 action alleging that the defendants, who were also members of the New York State Police, had violated his rights under the Fourteenth Amendment by engaging in selective enforcement of criminal laws against him in retaliation for his exercise of his First Amendment rights. Specifically, Diesel claimed that after he had engaged in misconduct (involving the consumption of alcohol while in possession and control of a police vehicle), the defendants had (in retaliation for his earlier cooperation with internal affairs) refused to turn a blind eye to his infraction and, instead of extending him "professional courtesy" and indulgence, had vigorously prosecuted his case.

Although a jury awarded Diesel substantial damages, this Court, on appeal, reversed the judgement, finding that the Diesel's "claim that [the defendant's prosecution of his case] violated his Fourteenth Amendment rights fails as a matter of law." *Diesel*, 232 F.3d at 105. We concluded that the only unequal or discriminatory treatment Diesel had suffered was *the withholding of the preferential treatment police officers usually enjoyed*, which would have immunized him from the consequences of his own serious misconduct. The Court reasoned that Diesel's Equal Protection claim alleged only that he "was deprived of a privileged status to which he had no constitutional entitlement" and that to find that the denial of such preferential treatment constitutes an Equal Protection violation "would stand the Equal Protection Clause on its head." *Diesel*, 232 F.3d at 104.

At the same time, the Court took pains to distinguish Diesel's claim that he was denied "professional courtesy" from another, and very different possible claim, namely that the investigation into his drunk driving was more vigorous than that conducted against the average citizen. As regards this claim, the Court dismissed Diesel's complaint not because it failed to state a violation of the Fourteenth Amendment but because Diesel had, in fact, presented "no evidence that the [defendants] treated [him] selectively as compared to similarly situated ordinary people." *Id.* The Court, in effect, acknowledged that even though officials cannot sustain a § 1983 retaliation and Equal Protection claim by proving that they were prosecuted more vigorously than is consistent with "professional courtesy," they can sustain such a claim by proving that they were prosecuted more vigorously than is consistent with ordinary police practices. Accordingly, the case before us turns on which side of this distinction Leather's case falls.

Because that question turns on the sufficiency of the evidence presented to the jury, because the record is well-developed on the issue, and out of respect for the district court's docket, we decide the question ourselves rather than remanding the case for further consideration by the district court. And although the district court (reasoning without the benefit of *Diesel*, which was decided after its decision) expressed some uncertainty on its way to upholding the jury's verdict, we have no doubt that on the record before us the evidence given to the jury was sufficient to permit its verdict to stand under *Diesel*.[5]

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5. We note that given defendants' failure to object to the district court's evidentiary rulings, the jury's verdict must be interpreted in light of all the evidence it heard.

Appendix A

The charge in response to which the jury returned its plaintiff's verdict stated that the defendants were "permitted and, indeed, . . . required by the law to enforce the law" and that the plaintiff's case depended on his contention that "the defendants in effect watched him, lay in wait for him, knowing that he was in the habit of drinking alcoholic beverages . . . and then driving home after having done so." Indeed, the district court expressly instructed the jury that it was required to "ascertain whether the plaintiff has proved . . . that the arrest for driving while impaired by alcohol was a calculated event planned ahead of time to punish him for having spoken out on the subject of the E-911 program . . . or simply the result of circumstances . . . which led to a decision to chase the car that he happened to be driving and stop him before the officers acting even knew [who he was]." There was nothing in the charge to the jury to suggest that they could find for the plaintiff if they believed that he had been deprived of the preferential treatment often given by the police to town officials.

Accordingly, the jury, in returning its verdict, must be deemed to have found that the plaintiff was discriminatorily sought out and investigated for drunk driving rather than merely that he, having been caught by non-discriminatory means, was denied the benefit of "professional courtesy."

Appendix A

III. CONCLUSION

Having considered all of defendants' claims and found them to be without merit, we AFFIRM the decision of the district court.

For the Court,

ROSEANN B. MacKECHNIE

Clerk of Court

by: s/ Lucille Carr

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 11, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 06735 (CLB)

JOHN LEATHER,

Plaintiff,

-against-

MICHAEL TEN EYCK, Individually, THOMAS LINDERT, Individually, CARMINE RESTIVO, Individually, DANIEL STEVENS, Individually, ROBERT THOUBBORON, Individually, and THE COUNTY OF PUTNAM, NEW YORK,

Defendants.

MEMORANDUM & ORDER

Brieant, J.

In compliance with the Mandate of the Court of Appeals in *Leather v. Ten Eyck*, 180 F.3d 420 (2d Cir. 1999), the issues in this case were tried to a jury beginning on February 7, 2000, resulting in a verdict on February 15, 2000 in favor of Plaintiff against defendants Ten Eyck, Lindert, Restivo and Thoubboron, as well as the County of Putnam. Compensatory damages in the amount of $200,000 were

awarded against all Defendants jointly and severally, and punitive damages were imposed in the amount of $2,000 against Michael Ten Eyck, $3,000 against Thomas Lindert, $5,000 against Carmine Restivo, and $435,000 against Robert Thoubboron. The Court had dismissed the case against defendant Daniel Stephens at the close of Plaintiff's case for failure of proof.

Defendants now move for judgment as a matter of law dismissing all the claims, for a new trial on the issues of liability and damages, or in the alternative for a remittitur of the damages award. The motion was fully submitted for decision on March 17, 2000, and decision was deferred pending settlement. Although the case was settled by agreement of counsel, and the settlement approved by the County Legislature, its Resolution to do so was vetoed by the County Executive, and thereafter the case was reopened.[1]

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1. The decision to veto the settlement which was reached in this case after arms length post-trial negotiations between the attorneys for both sides with the aid of this Court, is, of course, entirely within the discretion of the County Executive. It seems, however, as appears from published reports, to be based on certain misapprehensions. First, an appeal will not "vindicate" the Sheriff; at most it could lead to a new trial before another jury, since our Court of Appeals has already declared the law of the case, and this Court followed the Mandate. Secondly, the jury verdict here stands for nothing more than a finding that Plaintiff proved at trial that it was more likely than unlikely that he was targeted for selective enforcement; issues of "guilt" or "innocence" of the Sheriff have no place in a discourse concerning civil litigation. Similarly beside the point are public charges by the Sheriff's personal attorney to the effect that the attorneys selected to defend both the County and

(Cont'd)

Appendix B

Familiarity of the reader with all prior proceedings had herein and with the prior decision of the Court of Appeals is assumed.

Liability

Plaintiff was the Fire Coordinator for the County of Putnam serving at the pleasure of the County Legislature. The individual Defendants were all members of the County Sheriff's Department, Mr. Thoubboron being the elected Sheriff of the County and head of that Department. The lawsuit seeks to recover damages for violation of Plaintiff's right to be free from selective enforcement of the laws, guaranteed to him by the Fourteenth Amendment of the United States Constitution and also to be free from official retaliation for expressing his opinion on a matter of public concern. Plaintiff contended and the trial jury found that in retaliation for expressing his opinion concerning the implementation of a new E-911 system in Putnam County contrary to the opinion of the Sheriff, he was targeted for selective enforcement of the New York State Vehicle and Traffic Laws relating to drunk driving. This Court is considering the motion must give full credence to the jury's verdict without regard to the Court's own opinion as to the truthfulness of any witness, or as to the inferences to be drawn from the evidence.

(Cont'd)
the Sheriff in this case were ineffective. This Court knows of no legitimate basis to criticize the quality of the representation furnished to defendants in this trial, and such unfounded criticism of the attorneys may have made more difficult the decision as to whether or not the settlement approval should be vetoed.

Appendix B

As a perquisite of his employment as the Fire Coordinator for the County, Mr. Leather was given the 24 hour use of a County owned automobile. Many other County officials and employees enjoyed the same benefit. The County had a rule against operating its vehicles after having imbibed liquor in any quantity.

Mr. Leather, apparently a man of steady habits, followed the regular practice of going to dinner with his wife on Friday evenings at the "Middlebranch," a restaurant and bar since closed, named after the New York City Reservoir of the same name, which was patronized by local officials, and was apparently a place where the elite meet to eat and drink.

On two prior occasions, defendant Ten Eyck, whose specialty was enforcing the laws against driving while impaired with alcohol, stopped Mr. Leather when he was driving home from the Middlebranch Restaurant.[2] On the first such occasion in the summer of 1994, Deputy Ten Eyck warned Mr. Leather, and ordered him to have his wife drive home. On the second occasion he administered three inconclusive breathalyzer tests and called in a village police officer to the scene. No ticket was issued to Mr. Leather and he was not arrested.

Plaintiff's witness David Ryan served as a deputy Sheriff in Putnam County between December 1983 and June 1995.

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2. Deputy Ten Eyck received statewide recognition from the Mothers Against Driving organization for 1996, and has made about 350 arrests for Driving While Intoxicated (DWI) or Driving With Ability Impaired (DWAI) and assisted in five or six hundred more such arrests.

He testified that some time in the late 1980's or early 1990's, at a change of shift, Captain Restivo gave an order to arrest John Leather for drunken driving. The jurors could have inferred that this took place in 1994 because Captain Restivo also mentioned Michael Lambiase as a target and both Leather and Lambiase were on the other side of the then existing public controversy as to how the E-911 system should be administered. Plaintiff claimed others were similarly targeted during this period. There was no evidence in the case of any intention to charge innocent persons with offenses because they engaged in policy disputes with the Sheriff. Rather, the professional courtesy ordinarily extended to public officials in vehicle and traffic matters was withdrawn and the rank and file officers were told that it was "open season" on John Leather and others. While there is no direct evidence that Lindert or Ten Eyck were present when Restivo gave the order, the jury could infer, in the context of a civil trial, that in the day to day operation of a quasi-military outfit, all the rank and file came to know of this.

It was the Plaintiff's initial theory in the case that, knowing of his habit of drinking with dinner at the Middlebranch on Friday evenings, the Sheriff's office had staked out the place, and that defendant Stephens was present in the bar for the purpose of observing Leather and telephoning headquarters when Leather drove home. There was no credible evidence at trial to support that theory. Stephens remained in the Middlebranch long after Leather had left, and there was no evidence that he or anyone else telephoned headquarters. Ryan testified, in the passive mode beloved of law enforcement witnesses, that "a phone call

was made." TT at 66. He did not testify that *he* received or overheard such a phone call, or that Stephens made the call, and in truth Mr. Ryan was on leave and not present in headquarters on the night of December 2, 1994. TT at 449. This was pure hearsay entitled to no weight.

Ryan admits that he had made a public statement to the effect that if he won the lottery, he would spend a million dollars to smear the Sheriff. This information was before the trial jury, and while this Court is somewhat skeptical of Ryan's testimony, the sole judges of credibility and the disputed fact issues were our trial jurors. The trial jurors had the right to believe Ryan's testimony, except as to those events where he was clearly not present and testifying solely based on hearsay or speculation. The jury chose to do so, rejecting the contrary testimony offered by the defendants.

Philip Prinz testified by deposition, portions of which were read to the jury commencing at page 284 of the February 8, 2000 transcript. Mr. Prinz became Undersheriff in January of 1986 and in March of 1996 was told by the Sheriff that he should resign. Prinz admits that he is a friend of Plaintiff and has a dislike for the Sheriff for forcing his retirement. Prinz testified to the public dispute over the E-911 system between Leather and the Sheriff. He also testified that the following occurred at a staff meeting prior to the arrest of Plaintiff:

> "I recall the Sheriff stating at a staff meeting that John [Leather] was a drinker, and that it wouldn't take too much effort to find him and arrest him for DWI."

TT at 297. This occurred just after the public hearings concerning the E-911 system. While Prinz's credibility is also suspect, the jury had the right to believe him, and this Court for purposes of a post-verdict motion cannot substitute its own view on this issue of credibility for the findings of the trial jury.

Accordingly, this Court concludes as a matter of law that there was sufficient evidence at trial to support a finding of selective enforcement as to John Leather, motivated by a publicly expressed shift in his opinion concerning the proper organization of the new E-911 system in the County of Putnam.

The events leading up to the December 2, 1994 arrest, viewed most favorably to the Plaintiff, as they must be, are set forth below. On Friday, December 2, 1994, Ten Eyck was on motor patrol westbound on State Route 6 at a location three miles from the Middlebranch, between the Middlebranch and the Plaintiff's home, when he observed a Camaro automobile traveling eastbound which had a non-functioning headlight. TT at 488 The vehicle also was speeding as confirmed by radar. Ten Eyck turned his vehicle around and stopped the Camaro. While he was standing in the road at the driver's side door of the Camaro investigating those traffic violations, Sergeant Lindert, on a supervisory tour, came to the scene in his vehicle and parked across the street. He observed that a passing eastbound white car almost hit Ten Eyck, and instructed him to "go get it." Officer Ten Eyck gave back the license to the operator of the Camaro and "told him to slow down and get his headlight fixed."

Appendix B

The passing vehicle was, as the reader has anticipated, operated by Mr. Leather, who was on his way home from the Middlebranch with his wife, having engaged in his regular Friday evening activities. While Mr. Ten Eyck denied under oath that he recognized the vehicle, and it was 9:00 p.m. at the time, and dark, there were lights from the two police vehicles and the passing traffic. Sufficient circumstantial evidence exists in the record to warrant an inference by the jury that Lindert and Ten Eyck at the very least knew it was a County owned vehicle with two people in it, and reasonably believed that it might be driven by John Leather, and that, in accordance with his usual weekly custom, he was very likely driving home from the Middlebranch. The County owned vehicles are white, they are of the same make and model, and the license plate series used for the County vehicles is known to law enforcement officers. Furthermore, John Leather's County owned vehicle had a red fire coordinator's insignia on the front identifying it as Car No. 1. TT at 270- 271. Mr. Leather's County car also had a plate above the official plate which read, "All county fire and EMS equipment." TT at 426.

Releasing and leaving a known speeding violator with a defective headlight, Lindert and Ten Eyck both "took off after the vehicle." They followed the Leather vehicle and the car behind it for some distance, and after a half mile observed Leather make a left hand turn onto North Main Street in Brewster. Ten Eyck observed that the vehicle crossed the double yellow line in violation of N.Y. V&T § 1126(a), an offense of which John Leather was later convicted in his trial before Justice Vercollone of the Town of Southeast, at the same time that he was convicted for DWAI (V&T § 1192.1).

Appendix B

Radioing Sergeant Lindert to the effect that he was going to make a traffic stop. Ten Eyck activated the overhead lights and alternate headlights on his vehicle, turned on the siren and blow his airhorn. Eventually, the vehicle pulled over on Paddock Lans at North Brewster Road and immediately after the stop, Mr. Ten Eyck observed Mr. Leather come out of his vehicle and walk towards the police car. The officer observed a strong odor of alcoholic beverage on his breath, glassy eyes, and that he was leaning on the back of the car. Plaintiff admitted that he had had "a couple of drinks at the Middlebranch Restaurant" and the deputy performed a field sobriety test. John Leather asked for professional courtesy (TT at 498) and Sergeant Lindert, who had arrived at the scene by that time "told him to exercise his *Miranda* rights and be quiet, call a lawyer and not to say anything." A blood test was taken within the two hour period permitted by § 1194(2)(a)(2), and traffic tickets were issued for crossing the double yellow line and for DWI. The blood test was returned at .09 per cent blood alcohol, sufficient to support a prima facie case for DWAI, but not sufficient to support a prima facie case for DWI.[3]

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3. Occasionally drunk drivers in New York have been convicted for so-called "common law" DWI, that is to say with no blood test or with a blood test of less than .10, but this is unusual, and a person charged with DWI is entitled to a trial by jury, while trials involving charges of DWAI are without a jury in New York. Alcohol when ingested begins to enter the bloodstream immediately in part, and at the same time begins to be metabolized by the liver, and excreted through the kidneys and the breath. Numerous variables affect the rates of absorption and elimination of alcohol in the blood, so that the level may vary one way or the other between the time of arrest and the time of the test.

Appendix B

Thereafter, there was a bench trial in the Town of Southeast Justice Court before Justice Vercollone on June 29, 1995 and July 6, 1995, followed by a conviction on August 2, 1995 for DWAI and crossing the double yellow line. No appeal was taken.

This Court previously concluded that the issue of selective enforcement, an absolute defense to a criminal prosecution in New York, had been raised and adjudicated in the trial before Justice Vercollone. The Court of Appeals held otherwise. Mr. Leather testified at this trial as follows:

> Q. (By Mr. Seymour) [D]idn't you, in fact, raise through your attorney the issue of selective enforcement at your criminal trial?
>
> A. That issue was raised by my attorney, definitely, yes. (TT at 398)

Whether Mr. Leather did in fact raise the issue of selective prosecution sufficiently to bar that claim in this subsequent litigation by reason of his conviction is purely an issue of law. That issue has been resolved adversely to the defendants by our Court of Appeals. *Leather v. Ten Eyck*, 180 F.3d 420, 426 (2d Cir. 1999). The entire record in the Justice Court was available to the appellee in connection with the prior decision of the Court of Appeals and this Court regards the issue to be barred at this trial by reason of the doctrine of law of the case. Plaintiff claims, and it may well be true, that at the time he was tried in the Justice Court of the Town of Southeast, he did not have the benefit of the pretrial discovery in this litigation and the testimony of the

witnesses Prinz and Ryan was unavailable, since they were still working for the Sheriff. The testimony of Leather, a layman, that he did in fact raise the defense adds nothing to the record which was previously before the Court of Appeals in support of this contention, and rejected by that Court.

Thereafter, as might be expected, the conviction received considerable publicity and came to the attention of the County Legislature, which also became informed that its policy which prohibits the drinking of liquor in any quantity prior to operating a County owned vehicle had been violated by John Leather. The Legislators, undoubtedly surprised by the notion that any of its many County officers and employees having 24 hour automobile privileges would drink *any* alcohol and then drive, foreseeably forced the resignation of Mr. Leather from his position as County Fire Coordinator.

This Court concludes as a matter of law that there is adequate evidence in this case, giving full latitude as we must to the jury's right to assess credibility and draw or reject disputed inferences, to support a finding that John Leather was selectively targeted in violation of his constitutional rights. This Court has no legal basis to disturb the finding of liability by our jury, and that portion of Defendants' motion which seeks a new trial on this issue, or judgment notwithstanding the verdict is denied.

Compensatory Damages

We then turn to the issue of compensatory damages. Mr. Leather documented substantial direct monetary damages flowing from the Constitutional violation. As a result of

losing his job as Fire Coordinator, foreseeably, Plaintiff lost over $22,000 in income for the years 1995 and 1996. TT at 377-380. Furthermore, Mr. Leather testified that the Fire Coordinator's salary has been raised significantly since 1996, to "70 to 80 thousand dollars a year." TT at 384. Therefore his lost salary increased to between $50,000 and $60,000 per year. He also lost health insurance and retirement coverage and lost the use of the all-expenses-paid County owned vehicle. Mr. Leather also incurred legal fees in his defense of the criminal trial of $6,000 plus $2,500 for hiring for trial purposes of a consultant on alcohol. TT at 372. As a result of his conviction he had to pay a $300 fine and "go to school." TT at 373. There was a $75 registration fee for traffic school, as well a $25 fee for a temporary driver's license. TT at 373. As of the date of trial, direct damages, estimating reasonable damages releasing to the loss of the health insurance and the County car as well as the salary range between around $200,000 and $230,000, which were mitigated to an extent by the fact that Mr. Leather renegotiated the scope of his work and salary as a paid fire official of the Town of Southeast.

In addition to his direct damages, Mr. Leather endured significant local publicity and notoriety, inflicted on a person who had previously held a good reputation in the community. TT at 381-382. Our jury was permitted to assess compensatory, or heartbalm damages in addition to direct damages for Mr. Leather's loss of reputation and for the mental anguish, shame and humiliation which he endured as a result of the Constitutional violation. The jury was aware of the fact that Mr. Leather really was driving while impaired by alcohol and that he had done it before. Presumably that

reduced awareness served to the reduce the compensatory award, in a case which otherwise could have supported a seven figure verdict. Driving under the influence of alcohol is a serious problem, particularly in a community where the roads are narrow and the traffic heavy. To an extent, Leather's own conduct was a concurrent cause of his damages and apparently was so regarded by the jury. The jury expresses the conscience of the community, and this Court must refrain from placing unreasonable restrictions on its power to do so, or second guessing its conclusions.

The Court concludes that the finding by the jury of liability, and the award of compensatory damages, in the amount of $200,000, standing alone, is reasonable in the context of the entire case, and may not be disturbed.

Punitive Damages

The entire issue of punitive damages in this case presents a far more difficult question. This trial record does not support an award of punitive damages in any amount as to defendants Ten Eyck, Lindert or Restivo. In *McCardle v. Haddad*, 131 F.3d 43 (2d Cir. 1997), our Court of Appeals held that such damages are appropriate in a § 1983 action "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." (Citing and quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)); *See also Meriwether v. Coughlin*, 879 F.2d 1037, 1048 (2d Cir. 1989), (cited with approval in *McCardle*,) (affirming vacatur of jury award of punitive damages in absence of evidence of evil motive or intent). The decision in *McCardle*

is in accord with the Supreme Court's ruling in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999).

There is no evidence in this trial record showing that these particular defendants were motivated by evil motive or intent, or reckless or callous indifference to Mr. Leather's rights. There is no evidence of any personal animus of the part of these defendants against Leather, and they should not be subjected to punishment for responding to a suggestion to the rank and file originating from the Sheriff that Leather was a known drinker and ought to be arrested. They were following orders which appeared facially reasonable. The Sheriff had a known policy of strict enforcement of the laws against drunk driving and no suggestion, order or instruction was ever given to them to procure anything but a *bona fide* arrest supported by credible evidence establishing guilt.

Traffic offenses in New York for the most part, do not require a *mens rea* and have been enforced with discretion on the part of road patrol officers, as well as by prosecutors. So called professional courtesy, under which violations are disposed of by a warning from the road patrol, instead of by arrest or the issuance of a ticket, has been extended regularly throughout the state to police officers and their families and members of the privileged classes such as legislators, judges, physicians, newspaper reporters and other reputable persons, many of whom are issued identifiable license plates on their vehicles. John Leather himself was the beneficiary of such professional courtesy on at least one occasion, which, the jury found, was withdrawn when he clashed with the Sheriff over the E-911 system.

Appendix B

The Court grants judgment to defendants Ten Eyck, Lindert and Restivo, setting aside as unsupported by the evidence so much of the jury verdict which awards punitive damages against them. Alternatively, if our Court of Appeals shall determine on review that there is sufficient evidence to support such an award, this Court concludes that the amounts awarded were excessive and rendered without reference to the Defendants' personal financial condition. Alternatively, a new trial on the issue of such damages is granted.

Insofar as concerns the Sheriff himself, we are constrained by the jury verdict that his conduct was motivated at least in part by personal animus against John Leather and that this animus arose out of protected constitutional activity by Leather. The jury also heard prior similar act evidence offered under Rule 404(b), F.R.E., and disputed by the Sheriff, to the effect that other political figures opposed to the Sheriff were charged with traffic violations in a similar context. Here again it was never claimed that any of the other persons mentioned in the trial record were innocent of the charges. They were simply denied the professional courtesy which is not uncommonly extended to public officials and others in connection with such offenses.

Accepting that punitive damages may be allowed in a case such as this, to further the legitimate interest in punishing unlawful conduct and to deter its repetition (*Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991)), this Court concludes that the award of $435,000.00 against defendant Thoubboron is so large as to shock the conscience of the Court, and exceeds the power of our trial

jury under the United States Constitution. The jury had no information whatever as to the financial ability of the Sheriff to respond to such a judgment, and may well have been motivated by excessive indignation, or perhaps a desire to punish for indignities visited on persons other than John Leather.

Whether a punitive damage award is so large as to shock the conscience of this Court, as this one does, depends on factors which include: (1) our consideration of the degree of reprehensibility; (2) the relationship of the punitive damage award to the compensatory damage award, and; (3) its relationship to the criminal sanctions generally imposed by society for comparable misconduct. *BMW of North America v. Gore*, 517 U.S. 559 (1996). The amount of punitive damages awarded should not be greater than the amount reasonably necessary to fulfill the twin purposes of punishment and deterrence, otherwise the award is a windfall to the individual litigant. Also, an award should not be "so high as to result in the financial ruin of the defendant." *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992) (citation omitted). We now discuss these factors.

While Mr. Thoubboron's tortious conduct as found by the trial jury was sufficient to give rise to tort liability, this Court does not perceive a high level of culpability attaching to his conduct. Denial of professional courtesy to observed violators of the traffic laws in retaliation for speech ranks low on the list of possible abuses of police power when compared with such violations of the public trust as the excessive use of force, racial profiling or framing innocent persons. We cannot overlook the fact that John Leather was

in fact a drinker, who drove his County vehicle between the Middlebranch and his residence every Friday night in violation of a statute intended to protect public safety. One who does so does not gain immunity by picking a political fight with the Sheriff.

Courts have measured the unreasonableness or excessiveness of punitive damages awards by comparing them with the actual harm inflicted upon the plaintiff, and it is ordinarily considered that the amount of punitive damages awarded must bear some proportion or some reasonable relationship to the harm actually incurred, as reflected in the compensatory damage award. The award of $200,000 compensatory damages in this case is probably close to the maximum amount that would be upheld by this Court as not excessive under the totality of the circumstances of this case. The much larger punitive award against Thoubboron bears no proportionality to the compensatory award.

The third factor considered is the comparable criminal sanction. An official engaging in selective law enforcement could be prosecuted criminally in a federal court for violation of Chapter 13 of Title 18 of the United States Code — Civil Rights. This Chapter prohibits a person from wilfully subjecting any person to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States. Sentencing Guidelines are established by the United States Sentencing Commission under § 2H1.1 for offenses involving wilful violations of such individual rights. The Guidelines cover a vast number of different possible violations of civil rights, including the right not to be murdered, but the basic federal

offense carries a Guideline Level of 6. Thus, the permissible fine imposed under that Guideline Level upon individual defendants (*See* Sentencing Guidelines § 5E1.2) ranges from $500 to $5,000.

Before being required to pay such a fine, a person situated as was the Sheriff, would have been entitled to all the Constitutional safeguards of a criminal trial, including the benefit of the presumption of innocence and a requirement of proof of guilt beyond a reasonable doubt, all of which were lacking here. The punitive damages awarded in this case are in no sense comparable with the sanction imposed by society with due process safeguards, for like conduct in a criminal context.

The punitive damages award here checks the conscience of the Court, and if allowed to stand would constitute a denial of Justice. *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 165 (2d Cir. 1998) (citation omitted). Comparing the possible exposure under the Sentencing Guidelines for a criminal civil rights violation, not present in this case, this Court concludes that the purpose of the jury in imposing punitive damages in this case would be fulfilled by a punitive damages award not to exceed $3,000, against defendant Thoubboron, which the Court finds is the maximum verdict that would be upheld by this Court as not excessive. *Earl v. Bouchard Trans. Co. Inc.*, 917 F.2d 1320, 1330 (2d Cir. 1990). See also *Trademark Research Corp. v. Maxwell Online, Inc.*, 995 F.2d 326, 337 (2d Cir. 1993).

Appendix B

Remittitur

This Court may not simply reduce the award of punitives, it must offer Plaintiff a new trial on the issue of damages alone. *Phelan v. Local 305 of the United Ass'n of Journeyman and Apprentices of the Plumbing & Pipefitting Indus.*, 973 F.2d 1050 (2d Cir. 1992). The Court exercises its discretion to grant a conditional new trial limited to the issue of compensatory and punitive damages, unless the Plaintiff, within fifteen (15) days shall execute a written *remittitur* reducing the punitive damages award against defendant Thoubboron to the amount of $3,000. The Court concludes that the punitive damages and the compensatory damages are so closely intertwined in this case that it would be impractical to have a new trial on the issue of the punitive damages alone. At such new trial, Mr. Thoubboron shall be permitted to introduce evidence of his current personal financial condition if he wishes to do so.

Lastly, it is argued that a county is not liable for acts of the sheriff as a policy maker, under New York law. Whether or not that is true appears to be of no moment, because at least as to federal claims the argument is precluded in this Circuit by *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986). In the context of this case the Sheriff is a policymaker for the County.

All other arguments made in support of the motions have been considered and are held to be without merit. Except as set forth herein, the defendants' motions are in all respects denied.

Appendix B

There is pending before this Court an application for legal fees in behalf of the Plaintiff. If the Plaintiff declines to accept the *remittitur*, this Court will defer fixing the legal fees until the retrial of the issue of damages has been concluded. If the Plaintiff accepts the *remittitur*, Plaintiff's counsel may now supplement their existing application to bring the lodestar up to date. No judgment will be entered at this time, pending decision on the application for legal fees.

So Ordered.

Dated: White Plains, New York
May 11, 2000

s/ CHARLES L. BRIEANT
Charles L. Brieant, U.S.D.J.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED JUNE 11, 1999

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 98-7275

JOHN LEATHER,

Plaintiff-Appellant,

v.

MICHAEL TEN EYCK, Individually, THOMAS LINDERT, Individually, CARMINE RESTIVO, JR., Individually, DANIEL STEVENS, Individually, ROBERT THOUBBORON, Individually, and THE COUNTY OF PUTNAM, NEW YORK,

Defendants-Appellees.

Argued Nov 2, 1998

Decided June 11, 1999

* * *

Before: CALABRESI and STRAUB, Circuit Judges, and TSOUCALAS, Judge.*

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* The Honorable Nicholas Tsoucalas, Judge of the United States Court of International Trade, sitting by designation.

Appendix C

CALABRESI, Circuit Judge:

Plaintiff John Leather appeals from an order of the United States District Court for the Southern District of New York (Brieant, *J.*), dismissing his 42 U.S.C. § 1983 claim that he was subjected to selective prosecution by the defendants in retaliation for the exercise of his right to free speech guaranteed under the First and Fourteenth Amendments.[1] The district court granted defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). In order to affirm that court's order, we must find that plaintiff "fail[s] to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). We conclude instead that the plaintiff should be permitted to pursue his § 1983 suit.

BACKGROUND

Leather's § 1983 claim is based on a course of events that occurred in Putnam County, New York. At that time, Leather was the duly appointed fire coordinator for the County, and the individual defendants were all members of the County Sheriff's Department.[2] In his complaint, Leather alleged that in 1992 and 1993 a fierce debate was taking place in the County over whether the Emergency "911"

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1. Leather also alleged in his complaint that defendants Ten Eyck and Lindert perjured themselves at his state court hearing. This claim was withdrawn before the district court.

2. Defendant Thoubboron was Sheriff of Putnam County, defendant Ten Eyck was a Deputy Sheriff, Defendant Lindert was a Sergeant, defendant Restivo was a Captain, and defendant Stevens was a Senior Investigator.

communications center ("E-911") would be controlled by civilians or by the County Sheriff's Office. Leather maintains that he was a vocal public advocate on behalf of vesting control of the E-911 services in civilian hands, which, he argued, would lead to better emergency services in the community. In contrast, the members of the Sheriff's Office were actively trying to gain control of the E-911 communications center.[3]

Leather contends that, in retaliation for his public statements, the Sheriff's Office both threatened him (and others who made similar statements) and targeted him for prosecution. Specifically, Leather alleges that on the evening of December 2, 1994, three members of the Sheriff's Department kept him under surveillance while he dined at a local restaurant with his wife and consumed one or more alcoholic beverages. Shortly after he and his wife left the restaurant, Leather was stopped on the road by two of the officers (Ten Eyck and Lindert) and arrested on charges of driving while intoxicated. Thereafter, he was successfully prosecuted on a lesser charge of driving while impaired (because his blood alcohol level, which tested at .09 percent, was insufficient to support a per se finding of driving while intoxicated). He was assessed a $300 fine as well as a $25 surcharge, and his driver's license was suspended for 90 days. Leather did not appeal this conviction, rendered in the Justice Court for the Town of Southeast.

Instead, Leather proceeded to file this § 1983 suit. The defendants, after submitting an answer to the complaint,

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3. The Sheriff's Office apparently succeeded in its efforts.

moved to dismiss the complaint under Federal Rule of Procedure 12(b)(6) for failure to state a claim.[4] The district court granted defendants' motion and dismissed Leather's selective prosecution claim, reasoning that the claim's success "would 'necessarily imply' the invalidity of [his criminal] conviction" in contravention of the Supreme Court's holding in *Heck v. Humphrey,* 512 U.S. 477, 487, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). *Leather v. Ten Eyck,* No. 97 Civ. 6735 (S.D.N.Y. Feb. 2, 1998). The district court also noted in passing that although the defendants conceded that no evidence of selective prosecution was presented by Leather in his state criminal trial, Leather's trial attorney did, in his closing argument, among other things, mention that "[t]here[was] something phoney going on."

Leather appeals, contending that the district court's dismissal was improper because *Heck v. Humphrey* does not bar his § 1983 suit. The defendants in turn argue both that *Heck* and principles of preclusion (res judicata and collateral estoppel) bar Leather's suit. We vacate and remand.

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4. Because the defendants had filed an answer to Leather's complaint, they should have moved for judgment on the pleadings pursuant to Rule 12(c). *See* Fed.R.Civ.P. 12(b), (c); *Falls Riverway Realty v. City of Niagara Falls,* 754 F.2d 49, 53 (2d Cir.1985). "Pursuant to Fed.R.Civ.P. 12(h)(2), however, a defense of failure to state a claim may be raised in a Rule 12(c) motion for judgment on the pleadings, and when this occurs the court simply treats the motion as if it were a motion to dismiss." *National Ass'n of Pharmaceutical Mfrs., Inc. v. Ayerst Labs.,* 850 F.2d 904, 909 n. 2 (2d Cir.1988). Accordingly, the district court treated defendants' motion as one made pursuant to Rule 12(b)(6), and we will review it as such.

Appendix C

DISCUSSION

We review the dismissal of a complaint pursuant to Rule 12(b)(6) *de novo*. *See Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir.1996). And our review must accept the material allegations in the plaintiff's complaint as true. *See id.* "[U]nless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," dismissal is inappropriate. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). "This rule applies with particular force where the plaintiff alleges civil rights violations." *Chance v. Armstrong*, 143 F.3d 698, 701 (2d Cir.1998); *see also Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir.1994).[5]

I. *Heck v. Humphrey*

In *Heck*, a prisoner filed a § 1983 suit seeking money damages for various alleged improprieties on the part of the

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5. We have noted previously that

> [i]t is important to recognize the difference between disposing of a case on a 12(b)(6) motion and resolving the case later in the proceedings, for example by summary judgment. At the 12(b)(6) stage, [t]he issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test.

Chance, 143 F.3d at 701 (internal quotation marks omitted; alteration in original).

state police and county prosecutor responsible for his arrest and prosecution. He did not, however, seek release from prison confinement. *See Heck,* 512 U.S. at 479, 114 S.Ct. 2364. The Court held that although there is no exhaustion requirement in § 1983 actions, *see Patsy v. Board of Regents,* 457 U.S. 496, 516, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), nevertheless, a damages claim akin to Heck's could not lie, because the success of the § 1983 claim would necessarily imply that the plaintiff's prior conviction was invalid, *see Heck,* 512 U.S. at 486-87, 114 S.Ct. 2364. The Court held that, to proceed with a § 1983 suit, the "plaintiff must prove that the conviction or sentence has been reversed on direct appeal . . . or called into question by a federal court's issuance of a writ of habeas corpus." *Id.; see also Edwards v. Balisok,* 520 U.S. 641, 648, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997).

Following *Heck,* however, the question remained open whether a plaintiff, convicted of a criminal offense, could proceed with a § 1983 claim where no remedy of habeas corpus existed. The court below read the rationale of *Heck* to preclude such a suit and hence dismissed Leather's § 1983 claim. Since the district court's decision, however, that question has been answered in this Circuit. In *Jenkins v. Haubert,* 179 F.3d 19 (2d Cir.1999), this Court held that "*Heck* and *Edwards* do not bar a § 1983 claim challenging the conditions of a prisoner's confinement where the prisoner is unable to challenge the conditions through a petition for federal habeas corpus." *Id.* at 21.

Although Leather's action does not challenge conditions of confinement, *Jenkins* implies the inapplicability of *Heck*

for Leather. Because Leather is not and never was in the custody of the State, he, like *Jenkins,* has no remedy in habeas corpus. Having escaped the jaws of *Heck,* Leather should therefore be permitted to pursue his § 1983 claim in the district court unless principles of res judicata or collateral estoppel preclude his suit.

II. *Res Judicata and Collateral Estoppel*

The defendants argue that Leather's claims are barred both by res judicata (claim preclusion) and collateral estoppel (issue preclusion). "Under the doctrine of claim preclusion, [a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Rivet v. Regions Bank of La.,* 522 U.S. 470, 118 S.Ct. 921, 925, 139 L.Ed.2d 912 (1998) (internal quotation marks omitted; alteration in original); *see also Blonder-Tongue Labs., Inc. v. University of Ill. Found.,* 402 U.S. 313, 350, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971); Restatement (Second) of Judgments § § 17-19 (1982). Instead, "[c]ollateral estoppel . . . means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Schiro v. Farley,* 510 U.S. 222, 232, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994) (internal quotation marks omitted). Under Rule 8(c) of the Federal Rules of Civil Procedure, both are affirmative defenses that must be pleaded by the defendant.

In a federal § 1983 suit, the same preclusive effect is given to a previous state court proceeding as would be given to that proceeding in the courts of the State in which the

judgment was rendered. *See* 28 U.S.C § 1738 (1994); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 82-83, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 476, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982); *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). Because we conclude that courts in the State of New York would not bar Leather's suit on either res judicata or collateral estoppel grounds, we hold that Leather should be allowed to proceed with his § 1983 claim.

The defendants argue first that res judicata prohibits Leather's federal suit. Because Leather could have sought coram nobis relief for his alleged injuries in the New York State courts, the defendants say, Leather should be barred from bringing this suit. This, however, misconstrues the doctrine of claim preclusion and is instead essentially an argument in favor of reading an exhaustion requirement into § 1983 — a position that, as we have already noted, the Supreme Court has expressly rejected. *See Patsy*, 457 U.S. at 503, 102 S.Ct. 2557.

Nor does res judicata preclude this suit on any other ground. It might seem plausible to argue that the plaintiff could have raised the essence of his current claim, selective prosecution, in his New York criminal proceeding, and, not having done so, is barred by claim preclusion from making the allegation now. But, under New York law, the form of relief being sought is an element of the litigant's claim. And because the nature of the prior state court proceeding was such that Leather could not have sought damages for his alleged constitutional injuries (while defending himself on the charge of driving while impaired), res judicata does not

bar his federal § 1983 suit for damages. *See Parker v. Blauvelt Volunteer Fire Co., Inc.*, 93 N.Y.2d 343, 690 N.Y.S.2d 478, 712 N.E.2d 647, 650 (1999) (holding that a § 1983 claim was not prohibited by claim preclusion because the plaintiff could not have sought damages in his prior Article 78 proceeding arising out of the same facts, and noting agreement with our decision in *Davidson v. Capuano*, 792 F.2d 275, 282 (2d Cir.1986), which held that a § 1983 suit for damages that could not have been joined to an Article 78 proceeding was not barred by res judicata even though it arose out of the same operative facts as the Article 78 proceeding).[6]

The defendants next assert that, even if res judicata does not apply, collateral estoppel prohibits Leather's suit. In this respect, the defendants claim that Leather's selective

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6. The New York Court of Appeals observed that its holding was

> also consistent with the position of the Restatement (Second) of Judgments that res judicata is inapplicable where the plaintiff "was unable to . . . seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain . . . multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action . . . to seek that remedy or form of relief."

Id. at 650 (quoting Restatement [Second] of Judgments § 26[1][c]). The Court of Appeals in *Parker* nevertheless affirmed the lower court's dismissal of the federal suit on issue preclusion grounds. *See id.* at 651.

prosecution argument was raised by his counsel during his State court prosecution, that the local court decided the question against him, and that Leather therefore may not now seek to relitigate the same issue.

At Leather's state court hearing, Leather's attorney argued in his closing:

> Everything [was] set up here. Everybody [was] in the right place at the right time. . . .
>
> . . . . .
>
> The cops are lying. There's something phoney going on. What's a B.C.I. man doing running in and out of the [restaurant] while [Leather] is having dinner? Does that make sense?
>
> It makes sense to me. I can picture it.
>
> "Get ready, boys, he's coming home. He's coming down the road. Now we have him."

It is this closing argument that, according to the defendants, sufficiently raised the contended issue of whether Leather was the target of a selective prosecution as to estop Leather from collaterally relitigating the issue in federal court.

Under New York law,

> [c]ollateral estoppel . . . "precludes a party from relitigating in a subsequent action or proceeding

> an issue *clearly raised* in a prior action or proceeding and decided against that party . . ., whether or not the tribunals or causes of action are the same." The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action.

Parker, 712 N.E.2d at 651 (quoting *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500, 478 N.Y.S.2d 823, 467 N.E.2d 487 (1984)) (citations omitted; emphasis added; alteration in original).

In *Central Hudson Gas & Electric Corporation v. Empresa Naviera Santa S.A.*, 56 F.3d 359 (2d Cir.1995), this Court set forth the requisite factors for the application of collateral estoppel under the common law as follows:

> (1) the issues of both proceedings must be identical, (2) the relevant issues [must have been] *actually litigated* and decided in the prior proceeding, (3) there must have been "full and fair opportunity" for the litigation of the issues in the prior proceeding, and (4) the issues [must have been] necessary to support a valid and final judgment on the merits.

Id. at 368 (emphasis added); *see also Doe v. Pfrommer*, 148 F.3d 73, 79 (2d Cir.1998) (applying the four-factor test in a case involving New York law); Restatement (Second) of

Judgments § 27 (1980) (setting forth the same test). "The burden [moreover] is 'on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose *was actually decided in the first proceeding.*' " *Schiro,* 510 U.S. at 233, 114 S.Ct. 783 (quoting *Dowling v. United States,* 493 U.S. 342, 350, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990)) (emphasis added).

Collateral estoppel is thus both narrower and broader than res judicata. Unlike res judicata, collateral estoppel bars *any* issue that was raised and litigated in a prior proceeding from being subsequently relitigated in a different, parallel proceeding, provided that the first proceeding offered the litigant a full and fair opportunity to litigate the issue. In contrast to claim preclusion, however, collateral estoppel does not prevent a litigant from raising, in a later proceeding, an issue that he could have, but did not, raise in the first proceeding. As a result, even if a party, like Leather, *could have* raised a specific defense — selective prosecution — in his prior criminal prosecution, preclusion based on collateral estoppel grounds does not lie unless the issue was indeed actually litigated.

The question in this case, therefore, is whether or not the issue of selective prosecution was actually litigated in the State court proceeding. On this record, we cannot say that the question of selective prosecution was "clearly raised," "actually litigated," or "actually decided" in the State court hearing. Leather's attorney at that hearing did mention what might be construed as a selective prosecution argument. But he did so at most in passing, certainly not explicitly, and only in his closing argument. Moreover, we cannot say

that the Justice Court necessarily rejected the argument (assuming that it was made), for the court set forth absolutely no findings on this point in its judgment of conviction. Finally, the defendants conceded before the district court that no evidence of selective prosecution was presented by Leather in his state criminal trial. Under the circumstances, we hold that the issue was not clearly raised by Leather's counsel or ruled on by the State court. It follows that this is not a case in which collateral estoppel can bar Leather's subsequent § 1983 suit.

CONCLUSION

The district court's dismissal of the plaintiff's § 1983 claim was erroneous. Its judgment is therefore VACATED and the case is REMANDED for proceedings consistent with this opinion.

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 2, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 6735 (CLB)

JOHN LEATHER,

Plaintiff,

-against-

MICHAEL TEN EYCK, Individually, THOMAS LINDERT, Individually, CARMINE RESTIVO, Individually, DANIEL STEVENS, Individually, ROBERT THOUBBORON, Individually, and the COUNTY OF PUTNAM, NEW YORK,

Defendants.

MEMORANDUM & ORDER

Brieant, J.

Before this Court for decision is a motion in this civil rights case filed November 21, 1997, and heard on January 9, 1998, to dismiss the complaint on its face pursuant to Fed. R. Civ. P. 12(b)(6). In addition to considering the complaint itself, the Court considers matters of public record in state court, and facts agreed to at the time of the hearing on the motion, recognizing that the issue probably ought to have

been presented to the Court in the context of a summary judgment motion, the choice to proceed under Rule 12 instead apparently being dictated by desired considerations of expense.

Background

Plaintiff John W. Leather sues for damages for deprivation of his rights guaranteed under the First and Fourteenth Amendment of the United States Constitution. Plaintiff is a resident of Putnam County who was a duly appointed fire coordinator for the County. As such, he was not a subordinate of the Sheriff. Defendants include the County of Putnam and the Sheriff, Robert Thoubboron, as well as Defendant Ten Eyck, a Deputy Sheriff, Defendant Lindert, a Sergeant employed in the Sheriff's Office; Defendant Restivo, a Captain in that Office; and Defendant Stevens, who is a Senior Investigator in that Office.

So much of the complaint found in ¶ 21 which alleges perjury on the part of Defendants Ten Eyck and Lindert has been withdrawn at the hearing. *See* transcript. All of the remaining well-pleaded facts in the complaint must be accepted as true for purposes of this motion. Probably the Court does not have to accept as true fanciful allegations "so attenuated and unsubstantial as to be absolutely devoid of merit." *Neitzke v. Williams*, 490 U.S. 319, 327 n.6 (1989) (12(b)(1)) (quoting *Hagans v. Lavine*, 415 U.S. 528, 536-38 (1974); and citing *Bell v. Hood*, 327 U.S. 678 (1946)).

For a number of years the County of Putnam has been engaged in establishing and improving the so-called "E-911"

system for police, fire and other emergency communications between members of the public and local officials, fire departments, police departments and other agencies which respond to emergencies. Some participants in the public controversy surrounding E-911, including the Plaintiff, thought that the emergency communications center being established by the County should be operated under civilian control. Others, including Defendants, advocated that the operation and control be vested in the Sheriff's Office. The Sheriff seems to have prevailed on this issue over time, and the complaint asks us to assume that Defendants are "sore winners" who developed a "strong animosity" toward Plaintiff. (Complaint at ¶ 11).

The complaint alleges that the Defendants entered into a plan by means of which local opponents of the Sheriff's desire to control the E-911 center were to be "targeted by the Sheriff's Office for retaliatory and selective enforcement of the law." (Complaint at ¶ 12). It is alleged that the Sheriff met with subordinate members of his office at staff meetings and identified those targeted for punitive counter-measures, and that the Sheriff "suggested that whoever on the Sheriff's staff first arrested [Plaintiff] would be rewarded." (Complaint at ¶ 14).

The complaint goes on to allege, and we assume, that Plaintiff, a man of steady habits, dined regularly with his wife on Friday evenings at a well-known local watering spot known as the "Middlebranch," after a New York City Reservoir of that name, and typically had "a cocktail or two," with dinner following which he would drive his motor vehicle to his home.

Appendix D

We are told that on December 2, 1994, a Friday night, Defendants Stevens, Lindert and Ten Eyck placed the Plaintiff under surveillance at the Middlebranch, and followed him from that location "with a view towards arresting him for driving while intoxicated." (Complaint at ¶ 17). It does appear that the Plaintiff may have partaken of alcoholic beverages that night at the Middlebranch. The Plaintiff was arrested by Defendant Ten Eyck, assisted by Defendant Lindert, for violating the New York Vehicle and Traffic Law on charges that he was Driving While Intoxicated (V&T § 1192.3). Those charges were later reduced to Driving While Impaired in violation of V&T § 1192.1. A blood alcohol content of .10 percent is a *per se* violation of § 1192.3. As noted below, Mr. Leather tested at .09 percent.

We are then told that the Sheriff issued press releases reporting this arrest and consequent prosecution, accurately, and that as a result of these events "the County Legislature effectively forced Plaintiff to resign as Fire Coordinator." (Complaint at ¶ 22).[1]

Mr. Leather appeared in the Justice Court of the Town of Southeast before Justice Vercollone. He was charged with Driving While Intoxicated in violation of New York Vehicle and Traffic Law § 1192.3, and for driving left of the pavement marks in violation of § 1126(a) of that statute. On January 24, 1995, the first charge was reduced to a violation of

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1. The County Legislature consists of nine members elected from separate geographic districts within the County and consists of Republicans and Democrats. We are not told how that body could "force" the resignation of Plaintiff or why it would do so on a single conviction of driving while impaired.

Appendix D

Vehicle and Traffic Law § 1192.1, Driving While Ability Impaired. A bench trial was held on June 29, 1995, and on July 6, 1995, and after trial, Mr. Leather was found guilty on August 2, 1995 by decision of Justice Vercollone for violation of § 1192.1 and 1126(a). On September 26, 1995, Plaintiff was sentenced to a $300.00 fine and a $25.00 surcharge, together also with a 90 day suspension of his driver's license. No appeal was taken.

It is conceded on oral argument, and appears from the transcript that no *evidence* of selective prosecution was presented to Justice Vercollone, perhaps because Defendant (Plaintiff here) didn't have any. However, in his opening statement the Prosecutor undertook to prove that the blood alcohol level of Mr. Leather was .09 percent, and apparently did so. The attorney for Mr. Leather in the Justice Court did argue in his closing statement to the Court that the arrest was "a set-up," and also argued as follows:

> "The cops are lying. There's something phoney going on. What's a BCI man doing running in and out of the Middlebranch while he [the Defendant] is having dinner? Does that make sense? It makes sense to me. I can picture it. 'Get ready, boys, he's coming home. He's coming down the road. Now we have him.' I ask that this case be dismissed."

This argument appears to have been polished up somewhat to form the basis for what now manifests itself as this civil lawsuit. Based on what is termed selective prosecution resulting in his conviction, Plaintiff brought this action seeking compensatory and punitive damages, as well as attorneys' fees.

Appendix D

Discussion

The narrow question raised by this motion to dismiss is whether success in Plaintiff's § 1983 action would necessarily undermine the validity of his state conviction. The theory of Plaintiff's civil rights complaint is that defendants selectively enforced the New York Vehicle and Traffic Law in order to retaliate against him for exercising his First Amendment rights. The contours of a selective enforcement claim under § 1983 were delineated by our Court of Appeals in *LaTrieste Restaurant & Cabaret v. Port Chester*, 40 F.3d 587 (2d Cir. 1994), upon which Plaintiff relies.[2] According to the Court, a claim for selective enforcement arises under § 1983

> (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.

Id. at 590.

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2. In *LaTrieste* the Second Circuit reversed this Court's Rule 56 dismissal of a § 1983 action brought by the proprietors of a "topless cabaret" who claimed that officials of the Village of Port Chester had enforced otherwise valid zoning ordinances against them in retaliation for their exercise of their first amendment rights. *See* 40 F.3d at 589-89. The Second Circuit reasoned that though the zoning ordinances were perfectly lawful, a genuine issue of fact existed as to whether the ordinances were being enforced in an unconstitutional manner. *Id.*

Appendix D

The instant case — in which Plaintiff sues after a criminal conviction — is of course factually distinguishable from *LaTrieste* where there may have been no criminal conviction, or if there was, plaintiff sued on the basis of an alleged continuing violation or threats of violation. Indeed, the facts of this case put Plaintiff's post conviction selective enforcement claim — brought as it is within the *LaTrieste* framework — on a collision course with the Supreme Court's holding in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

In *Heck*, an inmate brought § 1983 malicious prosecution action against a county prosecutor, attorney, and state police investigator, alleging that his state murder conviction was "engineered" in violation of his constitutional rights. *See* 997 F.2d 355, 356-57 (7th Cir. 1993). Invoking "the strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction," the Supreme Court affirmed the dismissal of the inmate's § 1983 action, holding that:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus . . . A claim for damages bearing that relationship

> to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.[3]

Heck, 512 U.S. at 484-87.

On its face, the broad bar established by this language would seem to be dispositive of Plaintiff's claim. The validity of Plaintiff's conviction has not been called into question in any way. As is usually the case with broad principles, however, this one was narrowed by a subsequent qualification. The *Heck* Court went on to state that where a § 1983 plaintiff seeks damages for the state conduct which led to his conviction:

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3. The potential conflict between these principles and those articulated by *LaTrieste*, was apparently not foreseen by our Court of Appeals which did not refer or cite to the *Heck* opinion. *See* 40 F.3d 587, *passim*. The interaction of the selective enforcement claim pleaded under *LaTrieste* with the competing principles established by *Heck* have yet to be thoroughly considered within this Circuit. As of this writing, neither *LaTrieste*, nor its predecessor *LeClair v. Saunders*, 627 F.2d 606 (2d Cir. 1980), are mentioned within any single state or federal opinion together with *Heck*, save one. That opinion, written by Judge Sand in *Ramos v. Patterson*, 1997 WL 363593 (S.D.N.Y. June 30, 1997), arose from a *Bivens* action brought *pro se* by a prison inmate convicted for RICO violations. Although Judge Sand characterized plaintiff's selective prosecution claim as brought pursuant to *LeClair*, he declined to hold that the *Heck* holding barred that claim. *Ramos*, 1997 WL 363593 at *2, *4. According to the Court, while "[s]ome of plaintiff's challenges would of necessity undermine the validity of his conviction and therefore be barred by *Heck*" others would not. *Id.* at *2. "Since the line between the two [was] not clearly drawn in plaintiff's *pro se* complaint and it [was] clear that all challenges fail[ed] on the merits," the Court chose to dismiss the complaint on the merits. *Id.*

> the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's actions, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed.

512 U.S. at 487.

Applying the *Heck* formulation to this case, we must determine whether success in the instant action would "necessarily imply" the invalidity of Plaintiff's conviction. For the reasons set forth below, we hold that it would.

1. *The elements required to establish selective enforcement as a criminal defense under New York law are identical to those required to establish a § 1983 claim for selective enforcement under LaTrieste*

In a recent case, *People v. Blount*, 90 N.Y.2d 998; 1997 WL 668382 (Oct. 28, 1997), the New York Court of Appeals set forth the elements necessary to establish a claim of selective prosecution:

> To establish such a claim, a litigant must show that the law was enforced with both an "unequal

> hand" and an "evil eye"; "to wit, there must be a showing not only that the law was not applied to others similarly situated but also that the selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary classification"

Blount at *1 (quoting *Matter of 303 W. 42nd St. v. Klein*, 46 N.Y.2d 686, 693, 416 N.Y.S.2d 219, 389 N.E.2d 815 (1979) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 1072-1073, 30 L.Ed. 220 (1886))).

The *Blount* court's reliance on *Matter of 303 W. 42nd St. v. Klein*, 46 N.Y.2d 686 (1979) is significant since that case was also cited by the *LaTrieste* court as support for its recognition of a § 1983 cause of action where one is "selectively treated" based on "impermissible considerations." *See* 40 F.3d at 590. This should not be surprising: *Blount* and *LaTrieste* simply apply the identical standard — that articulated by the seminal *Yick Wo* opinion — in their respective criminal and civil contexts. *See* 118 U.S. at 373-74.

2. *Plaintiff's success in this § 1983 selective enforcement action would necessarily imply the invalidity of his conviction*

To prevail in this action, Plaintiff must demonstrate that defendants treated him selectively, compared to others similarly situated, and that that treatment was based on an intent to punish him for exercising his first amendment rights. *LaTrieste*, 40 F.3d at 590. It cannot reasonably be disputed that had Plaintiff made such a showing at his criminal trial,

both New York law and the United States Constitution would have barred his conviction. *See People v. Utica Daw's Drug Co.*, 16 A.D.2d 12, 19 (1962) (where a defendant in a criminal prosecution succeeds in demonstrating selective enforcement, "the defendant is entitled to dismissal of the prosecution as a matter of law" regardless of guilt or innocence); *Goodman*, 31 N.Y.2d 268-269 (1972) (same); *People v. Blount*, 231 A.D.2d 860 (4th Dept. 1996) (same), *aff'd. Blount supra* 1997 WL 66382 at 2.

Heck states that a § 1983 action can go forward, if the "plaintiff can demonstrate that the conviction or sentence has already been invalidated." 512 U.S. at 487. Conversely, "a § 1983 cause of action for damages attributable to an unconstitutional conviction . . . does not accrue until the conviction or sentence has been invalidated." *Id.* at 489-90; *see also Tavarez v. Reno*, 54 F.3d 109, 110 (2d Cir. 1995). Indeed, even where success on a § 1983) action would "necessarily *imply*" invalidity, the action should be barred. *Id.* at 437. Barring actions which would imply or undermine convictions is consistent with the *Heck* Court's primary concern for "finality and consistency," and the prevention of "collateral *attack[s]* on . . . conviction[s] through the vehicle of a civil suit." *Id.* at 485-86 (emphasis added) (citations omitted). The Court determines that where success on a § 1983 action would "necessarily imply," rather than conclusively demonstrate, the invalidity of a prior conviction, the § 1983 action is not cognizable. Accordingly, the Court concludes that because success on this § 1983 action would necessarily imply the invalidity of Plaintiff's criminal conviction, defendant's motion to dismiss must be granted. *Heck*, 512 U.S. at 487; *see also Tavarez*, *supra*, 54 F.3d at 110; *Woods*

v. Cannella, 47 F.3d 545, 546 (2d Cir. 1995) (where no proof offered that conviction had been independently invalidated claim was properly dismissed).

The circumstances of this case prevent us from repeating the *LaTrieste* court's observation that there are "surprisingly few cases" in this "murky corner of equal protection law." 40 F.3d at 590 (quoting *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981)). That there are not more cases like this particular one is not surprising at all. It is well understood that as a practical matter an acquittal gives a defendant a free pass to the federal courthouse. The reciprocal principle — that a conviction practically bars such entry — typically deters plaintiffs from bringing post conviction § 1983 actions with the same frequency. Juries are not inclined to award damages to plaintiffs for allegedly unconstitutional conduct arising from their valid criminal convictions. Indeed, even if this case were to go to trial, it is difficult to imagine that any jury would award Mr. Leather money damages for conduct which involved prosecution for drunk driving, a crime which today evokes much justifiable public enforcement in New York is most prevalent in the area of Vehicle and Traffic Law violations. Members of the privileged classes such as legislators, judges, physicians and newspaper reporters in New York carry identifiable license plates on their vehicles. The least significant commissioner in state or local government bears on his rear bumper a gigantic bronze seal, and the private automobiles of police officers' families often display the decal of the PBA on the rear window. Most traffic violations do not require *mens rea*. They carry unpleasant consequences affecting automobile insurance and if

accumulated may lead to license revocation. However, driving while impaired by alcohol is regarded in New York as a most serious type of misconduct, likely to result in the death of innocent persons or other undesirable results. It seems monstrous to suggest that by incurring the political animosity of the Sheriff one may recover damages because that officer has procured his conviction for a drunk driving offense confirmed by a blood test.

For the reasons set forth above, defendants' motion to dismiss is granted. The Clerk shall file a final judgment.

SO ORDERED.

Dated: White Plains, New York
February 2, 1998

s/ CHARLES L. BRIEANT
Charles L. Brieant, U.S.D.J.

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN *YAJURE, et al v. DiMARZO, et al.*, No. 00 Civ. 7423 (CM) DATED AND FILED FEBRUARY 14, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

00 Civ. 7423 (CM)

EILEEN YAJURE and JORGE YAJURE,

Plaintiffs,

v.

RICHARD DiMARZO, individually, EUGENE TUMULO, individually, JOHN KELLY, individually, and THE CITY OF PEEKSKILL, NEW YORK,

Defendants.

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

McMahon, J.:

Plaintiffs bring this action against defendants Acting Director of Public Works Richard DiMarzo, Chief of Police Eugene Tumulo, and Mayor John Kelly in their individual capacities, and The City of Peekskill, New York, under 42 U.S.C. § 1983 for (1) selective prosecution in violation

of their rights guaranteed under the Equal Protection Clause of the Fourteenth Amendment; (2) violations of their rights of free speech, to petition government for the redress of grievances, and association as guaranteed by the First Amendment; and (3) violations of their right to be free from unreasonable seizures as guaranteed by the Fourth Amendment.

Defendants move to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. They also assert that DiMarzo, Tumulo and Kelly are entitled to qualified immunity for their actions, and that the federal civil rights complaint necessarily implicates the validity of plaintiffs' state court criminal conviction.

For the reasons stated below, defendants' motion to dismiss is granted.

FACTS PERTINENT TO THE MOTION

In July 1997, plaintiffs and nine other Peekskill ("the City") residents founded "Friends of Historic Peekskill" ("the Organization"), an organization that advocates the preservation of historic resources within the City.

Also in 1997, City Councilman John Kelly challenged the incumbent mayor of the City, Fran Gibbs, in her bid for re-election. With the support of Eileen Yajure, Mayor Gibbs won re-election. In 1999, after Mayor Gibbs announced that she would not seek another term in office, Yajure challenged

Councilman Kelly for Mayor, but lost. Since that time, plaintiffs allege that Mayor Kelly, acting by and through the City's Corporation Counsel, openly has threatened reprisals against certain residents of the City who supported Yajure in the election. Plaintiffs contend that Kelly arranged for the abolition of the City's Historic Preservation Advisory Board because members of that Board had supported Yajure.

Plaintiffs and their associates in Friends of Historic Peekskill later succeeded, through litigation, in barring the development of Fort Hill, a historic site the organization sought to protect.

In March 2000, plaintiffs learned of an intention by the Kelly Administration to demolish the historic Paraco Building ("the Building"). Eileen Yajure and her associates collected historical data regarding the Building, and they proposed that the City purchase and restore the Building rather than suffering its demolition. The City Council agreed to meet with those offering to purchase the Building on April 24, 2000, to review the historic data, and to consider the purchase of the Building. On April 21, 2000, the Friday before Easter Sunday, Mayor Kelly assured plaintiffs' associates that the Building would not be demolished over the Easter weekend.

Despite these assurances, defendants apparently intended to proceed with the demolition on Easter weekend. To that end, Kelly, along with Tumulo and DiMarzo, arranged to have the demolition crew of Tran Camp Corporation arrive at the Building at or about 8:00 a.m. on April 22, 2000. The crew was admitted to the site with the permission of City

officials and allowed to proceed with the demolition despite alleged violations of New York law in the demolition process.[1]

Plaintiffs somehow learned about the demolition and traveled to the site, where they evaded police barricades and entered without the City's permission. At or about the moment the motor on the demolition equipment was turned on by Tran Camp's operator, Eileen Yajure placed her foot into that equipment's claw, in an attempt to stop the operator of that equipment from commencing demolition. As Yajure placed her foot into the claw, the operator repeatedly raised and lowered the claw to force her to remove herself from the

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1. Plaintiffs charge that the presence of propane gas tanks violated the express provisions of the building demolition permit issued by the City to the demolition company; "Clearance Air Monitoring" had not been performed although required by the New York State Building Code; the City had not issued a "Notice to Proceed with Demolition," the issuance of which was a mandatory prerequisite for Tran Camp to enter upon the Building lot and to demolish the Building; a mandatory "sidewalk shed" required by the New York State Building Code had not been constructed; exterior glass window panes had not been removed, in violation of the New York State Building Code; dust control measures, mandated by the demolition permit, the demolition contract, and the New York State Building Code had been ignored; substantial barricades designed to keep from the demolition site persons not actually involved in the demolition itself, had not been erected, in violation of the New York State Building Code; mandatory pest extermination, required by both the demolition permit and contract, had not been performed; a mandatory examination of the exterior walls of that church had not been performed as required by New York State Building Code; and a mandatory temporary walkway intended to ensure the safety of pedestrians had not been constructed.

equipment. Meanwhile, her husband, Jorge Yajure, entered the Paraco lot and climbed up on a pile of woodchips which was adjacent to the Building's exterior walls. There he waved his arms and shouted for the equipment operator to stop. DiMarzo, who was on the scene, kept Tumulo and Kelly informed of the events via telephone.

The operator began to demolish the Building, and DiMarzo did not order them to stop. A police officer ran onto the Paraco lot and attempted to pull Mr. Yajure off the woodchip pile and away from the danger. The demolition continued, and DiMarzo ordered plaintiffs arrested and removed from the property. They were transported to Police Headquarters, where they were handcuffed to a bench for arrest processing. During that period, they shared the bench with an alleged child molester. DiMarzo signed a supporting deposition on the basis of which criminal charges — trespass and disorderly conduct — were filed against plaintiffs. After three hours, defendants were released from custody and issued appearance tickets. Plaintiffs later were convicted of the crimes of criminal trespass and disorderly conduct.

Plaintiffs allege that, in unnecessarily prolonging their imprisonment, defendants sought to punish them for their exercise of their First Amendment rights. They also charge that, by prosecuting plaintiffs, but not the demolition operators, defendants engaged in selective prosecution, motivated in substantial respect by a First Amendment retaliatory animus against plaintiffs. Finally, they allege that their three-hour detention amounted to an illegal seizure in violation of their Fourth Amendment rights.

Appendix E

DISCUSSION

The role of a district court in considering a motion to dismiss is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). The court must accept as true the factual allegations made in the complaint, *see LaBounty v. Adler*, 933 F.2d 121, 123 (2d Cir. 1991), and the complaint should not be dismissed "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)).

1. Fourteenth Amendment Selective Enforcement Claim

To plead an Equal Protection claim for selective enforcement, plaintiff must prove: (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person. *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 16 (2d Cir. 1999); *see also Gagliardi v. Village of Pawling*, 18 F.3d 188, 193 (2d Cir. 1994) ("it is axiomatic that a plaintiff [bringing a selective enforcement claim under § 1983] must allege that similarly situated persons have been treated differently").

Appendix E

Plaintiffs argue that the City harbored a retaliatory animus against them and selectively prosecuted them for the events of April 22, 2000 because of their opposition to Mayor Kelly. They allege that the City prosecuted them for trespass and disorderly conduct, while declining to prosecute the demolition crew for being "unlawfully on the property, violating the Penal Law, the State Building Code, the terms of their 'permits' and the express provisions of their contract." (Pl. Br. at 16.) Defendants respond that any alleged misconduct of the demolition crew (assuming, *arguendo*, that the demolition was proceeding in violation of the applicable codes) is not even remotely comparable to plaintiffs' actions as a matter of law, because the crew was lawfully on the property carrying out demolition work under an authorized contract. I agree.

The test for determining whether persons similarly situated were selectively treated is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent. *See Penlyn Dev. v. Village of Lloyd Harbor*, 51 F. Supp. 2d 255, 264 (E.D.N.Y. 1999) (noting that "apples should be compared to apples"). Plaintiff's selective enforcement claim fails because there is no way to objectively construe the acts of the plaintiffs and those of the demolition company as roughly equivalent. Plaintiffs made their way past a police guard and intruded upon an active demolition site, disrupting the work and creating a substantial danger to themselves and others. By contrast, the employees of the demolition company entered the site, acting pursuant to a contract with the City to take down the Building. Tran Camp's employees were authorized by the City to enter the property and to carry out demolition work.

Indeed, they were present under the supervision of City employees. Under New York law, one who "enters on premises . . . honestly believ[ing] that he is licensed or privileged to enter is not guilty of any degree of criminal trespass." *People v. Basch*, 36 N.Y.2d 154, 159, 365 N.Y.S.2d 836, 840 (1975). Far short of being a trespasser, Tran Camp was an invitee onto the property. The plaintiffs acknowledge in their Complaint that Tran Camp was accompanied and welcomed onto the premises by Peekskill police officers, DiMarzo and the City Building Inspector.

In *Albert v. Carovano,* 851 F.2d 561 (2d Cir. 1988), a group of minority college students were suspended for occupying Hamilton College's main administration building in protest of the College's policies toward South Africa. The students had occupied the building for three days, in violation of a court order adjoining them from disrupting the ingress to or egress from the building. *Id.* at 565. The students brought a selective enforcement claim, asserting that the college had wrongfully disciplined them for refusing to end their occupation of the building. *Id.* at 573. To support their claim, the students alleged, *inter alia*, that the college had failed to adequately discipline white students who had harassed and threatened others who were protesting the College's policy of continued investment in South Africa; failed to discipline or investigate students who made derogatory racial and sexual slurs to black female students; and only reluctantly and belatedly undertook an investigation of death threats of a black woman active in protesting the college's South Africa policy. *Id.* The court concluded that none of the allegations of nonenforcement involved circumstances "reasonably comparable to those surrounding

appellants' suspensions, in particular the uncontested fact of an outright refusal to obey the orders of a college official." *Id.* The Second Circuit noted:

> [T]he nature of the infraction and knowledge of the evidence [by defendants] must be sufficiently similar to support a finding of facial inconsistency. Otherwise, every conclusory selective-enforcement claim would lead to [broad] discovery . . . and then to a confusing, unmanageable and ultimately incoherent retrial of every [non-enforcement] decision.

Id. at 574.

As in *Albert*, the actions of plaintiffs and Tran Camp are not reasonably comparable for this court to uphold a claim for selective enforcement. Tran Camp was invited onto the property by City officials; plaintiffs were trespassers who evaded police barriers and placed themselves and possibly others in imminent danger. A decision by the city to charge trespassers with trespass against trespassers, and not to charge invitees with trespass, cannot be seen as comparing apples to apples, *see Penlyn*, 51 F. Supp. 2d at 264, and thus does not violate plaintiffs' Equal Protection rights as a matter of law.

Assume, *arguendo*, that Tran Camp had violated provisions of the Building Code. For plaintiffs to state a claim for selective prosecution, they would have to allege that they were prosecuted for violating the Code, while Tran Camp was not. Plaintiffs make no such allegation. They were not

arrested for failing to adequately prepare the site for demolition, which was one of the violations Tran Camp allegedly made, or for starting demolition without having all of the papers in hand. Rather, plaintiffs were arrested for trespass and disorderly conduct. There is no way to consider the behavior of Tran Camp and the plaintiffs as "roughly equivalent," *Penlyn*, 51 F. Supp. 2d at 264, so the claim of selective prosecution cannot stand.

2. First Amendment Claims

Plaintiffs also contend that by exercising their First Amendment right of association, speech and petitioning government, they were subjected to retaliatory arrest, imprisonment and criminal prosecution. They assert no independent claim for a violation of their associational rights.

In order to establish a First Amendment retaliation claim, a plaintiff must show that his conduct was protected by the First Amendment and that "defendant's conduct was motivated by or substantially caused by [plaintiff's] exercise of free speech." *Easton v. Sundram*, 947 F.2d 1011, 1015 (2d Cir. 1991), *cert. denied*, 504 U.S. 911, 112 S. Ct. 1943 (1992). A claim for First Amendment retaliation cannot be sustained "when the criminal prosecution was supported by probable cause." *Duamutef v. Morris*, 956 F. Supp. 1112, 1116 (S.D.N.Y. 1997); *Mozzochi v. Borden*, 959 F.2d 1174, 1179-80 (2d Cir. 1992) ("An individual does not have the right under the First Amendment to be free from a criminal prosecution supported by probable cause that is in reality an unsuccessful attempt to deter or silence criticism of the government"); *Singer v. Fulton County Sheriff*, 63 F.3d 110,

120 (2d Cir. 1995), *cert. denied*, 517 U.S. 1189, 116 S. Ct. 1676, 134 L. Ed. 2d 779 (1996) (upholding dismissal of First Amendment retaliation claim: "if the officer . . . had probable cause . . . then we will not examine the officer's underlying motive in arresting and charging the plaintiff.").

A prosecution and conviction, if not overturned, is conclusive evidence that an arrest was supported by the requisite probable cause. *Cameron v. Fogarty*, 806 F.2d 380, 387 (2d Cir. 1986) ("[T]he common-law rule, equally applicable to actions asserting false arrest, false imprisonment, or malicious prosecution, was and is that the plaintiff can under no circumstances recover if he was convicted of the offense for which he was arrested."). Here, plaintiffs were convicted for trespassing on an active demolition site. The conviction was, as a matter of law, supported by probable cause to arrest. Any claim of retaliation therefore must fail.

3. Fourth Amendment Claim

Plaintiffs allege that the decision to hold them for three hours, handcuffed next to an alleged pedophile, was an unreasonable seizure in violation of the Fourth Amendment. This claim, too, lacks merit as a matter of law.

Plaintiffs cannot deny that there was probable cause to arrest them, because they were tried and convicted of the crimes for which they were arrested. The only fact alleged by plaintiffs tending to demonstrate that their Fourth Amendment rights were abridged was their being held after their arrest for three hours. But three hours in police custody following their arrest does not constitute an unreasonable seizure.

Appendix E

New York Criminal Procedure Law requires that "[u]pon arresting a person without a warrant, a police officer, after performing without unnecessary delay all recording, fingerprinting and other preliminary police duties required in a particular case, must . . . without unnecessary delay bring the arrested person before a local criminal court and file therewith an appropriate accusatory instrument charging him with the offense or offenses in question." N.Y. Crim. Proc. Law § 140.20(1). The Legislature did not set rigid time limits in enacting the statute, nor has the New York Court of Appeals imposed them. *See People v. Brown*, 568 N.Y.S.2d 575, 77 N.Y.2d 422 (1991). Rather, the statute requires that a prearraignment detention "not be prolonged beyond a time reasonably necessary to accomplish the tasks required to bring an arrestee to arraignment." *Id.* In *Brown*, the court held that a delay of arraignment of more than 24 hours was "presumptively unnecessary and, unless explained, constitutes a violation of CPL 140.20(1)." *Id.*

In the present case, plaintiffs were arrested and detained for a mere three hours, after which they were released from custody and issued appearance tickets. They were later convicted of the crimes for which they were charged. In the three hour period, DiMarzo signed a supporting deposition; officers wrote up appearance tickets; and plaintiffs were released. As a matter of law, three hours is not an unreasonably long period for arrest processing in the City of Peekskill.

Appendix E

For the foregoing reasons, defendants' motion to dismiss is granted. I find it unnecessary to reach defendants' other arguments.[2]

This constitutes the decision and order of the Court.

Date: February 14, 2001

s/ [illegible]
U.S.D.J.

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2. In particular, I need not reach defendants' *Heck v. Humphrey* argument. I am, of course, sympathetic to their position that an individual ought not be able to evade the reach of *Heck* — and set up a damages action — by declining to assert a defense in his criminal case. The Second Circuit, in limiting the reach of *Heck*, no doubt assumed that reasonable people would assert any and all defenses in a pending criminal proceeding in order to avoid conviction. They reckoned without plaintiff's counsel, who has pulled this same stunt several times to the knowledge of the court. Still, I am in no position to overrule the Circuit's view that *Heck* applies only when a defendant is incarcerated.